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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GARRET BORDERS,

Defendant and Appellant.

B210541

(Los Angeles County  
Super. Ct. No. TA062419)

THE COURT:\*

Garret Borders appeals from the judgment entered following his resentencing upon remand after an appeal of the judgment entered upon his convictions pursuant to a plea of no contest to 27 counts of committing a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a))<sup>1</sup> and one count of continuous sexual abuse of a child (§ 288.5, subd. (a)). Appellant admitted a multiple victim allegation within the meaning of section

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\* BOREN, P. J., ASHMANN-GERST, J., CHAVEZ, J.

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

667.61, subdivision (b). The trial court sentenced him to a term of 56 years, including an upper term sentence on the principal count and consecutive sentences on the others.<sup>2</sup>

Appellant's convictions were based upon the following facts: Three of his victims were his daughters whom he sexually molested over a number of years. The fourth victim was an eight-year-old neighbor with whom appellant and the child's mother participated in "oral sex activities." Photographs and videos of the sex acts between appellant and the minor were found on appellant's computer.

In the prior appeal in case No. B172962, in addition to rejecting other claims, the Court of Appeal rejected appellant's contention that imposition of the upper term and consecutive sentences violated the Fifth and Sixth Amendments as articulated in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). Ultimately, the United States Supreme Court granted appellant's petition for certiorari, vacated the judgment and remanded the matter to this court for consideration in light of *Cunningham v. California* (2007) 549 U.S. 270.

Pursuant to the United States Supreme Court's directive to reconsider the matter in light of *Cunningham*, on remand, we issued our opinion concluding that the trial court's imposition of the upper term sentence on the principal count violated the Constitution, and that the violation was not harmless beyond a reasonable doubt. We remanded the matter to the trial court for resentencing pursuant to the 2007 amendment to the determinate sentencing law (Senate Bill No. 40 [Stats. 2007, ch. 3, § 2] and *People v. Sandoval* (2007) 41 Cal.4th 825, 846-847.)

On remand, the trial court again imposed the upper term sentence on count 1 and consecutive sentences on the other counts and sentenced appellant to the aggregate prison term of 56 years to life. In imposing the upper term, the trial court noted that "the amount of evidence in aggravation" was overwhelming. The court pointed to the tender ages of the

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<sup>2</sup> Appellant was originally sentenced to 85 years to life. The People thereafter petitioned for a writ of habeas corpus seeking to dismiss the multiple victim finding, the continuous sexual offense conviction and two lewd act convictions pursuant to the statute of limitations. When the finding and convictions were dismissed, the trial court resentenced appellant to the 56-year term.

victims, “the trust factor” and that the lewd sexual conduct was filmed and photographed. The court stated, “[T]here is nothing that is more egregious than a 50 or 60-year-old man violating a five-year-old child for at least three years. That’s the most aggravating factor that I can come up with.” The court also considered as an aggravating factor the “fact that the child’s mother was involved.” The minute order states: “The court reaffirms the original sentence based on the following aggravating factors not previously stated at the time of sentencing: [¶] The age of minor victim, the time period of the behavior, the explicit nature of the videos and photographs taken of minor victim, the age of the defendant in comparison to the minor victim and the fact that defendant conspired with the minor victim’s mother to carry out and commit the crimes.”

We appointed counsel to represent appellant on appeal. After examination of the record, counsel filed an “Opening Brief” in which no issues were raised. On January 2, 2009, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider.

In response, appellant filed a motion requesting that we take judicial notice of a published opinion, which request was denied. In that response, however, he pointed out that the trial court in resentencing him, sentenced him to a term greater than that to which he had been previously sentenced. He was previously sentenced to a determinate term of 56 years. The trial court, apparently inadvertently, resentenced him to a term of 56 years to life.

Thereafter, the attorney general filed a letter brief, indicating that the trial court had erred in adding the life sentence to appellant’s previous 56 year sentence because a life sentence was “unauthorized following the dismissal of the multiple victim enhancement, as none of the surviving counts authorize anything other than a determinate sentence.” The attorney general requests that we correct this unauthorized sentence by modifying the judgment to impose a determinate prison sentence of 56 years. We agree with the attorney general.

We have otherwise examined the entire record and are satisfied that appellant's attorney has fully complied with her responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

The judgment under review is modified to strike the life term and impose only the determinate term of 56 years and is otherwise affirmed. The trial court is directed to modify the abstract of judgment to be consistent with this decision.

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